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SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 781

MELVIN C. JENKINS, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1964
CERTIORARI GRANTED DECEMBER 14, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 761

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 208-63

UNITED STATES OF AMERICA,

vs.

MELVIN C. JENKINS, Defendant.

Transcript of proceedings—May 24, 1963

Washington, D. C.

The above cause came on for trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury, at 2:30 p.m.

APPEARANCES:

For the Government: John H. Treanor, Jr., Esq., Assistant United States Attorney.

For the Defendant: Thomas R. Jones, Esq.

* * * * * * *

[fol. 5] The Court: You may proceed, Mr. Treanor.

Mr. Treanor: Mrs. Korn, please.

SOPHIE KORN called as a witness by the Government, having been duly sworn was examined and testified as follows:

Direct examination.

By Mr. Treanor:

Q. Would you state your full name, please?

A. Mrs. Sophie Korn.

The Court: You will have to speak loud enough for everyone to hear you. Will you repeat your name, please?

The Witness: Mrs. Sophie Korn.

Q. Would you spell your last name, please?

A. K-o-r-n.

[fol. 6] Q. What is your occupation, Mrs. Korn?

A. I operate a grocery store with my husband.

Q. What is the address of that grocery store?

A. 301 12th Street, Southeast.

Q. Does that store have a name?

A. Phil's Market.

Q. Very briefly——

The Court: May I suggest you might as well fix the venue now.

By Mr. Treanor:

Q. Is that 301 12th Street in the District of Columbia?

A. Yes, sir.

Q. Would you very briefly, Mrs. Korn, describe the interior of Phil's Market?

A. Well, it's a small store. It's sort of oblong, it's short in the front and it's an oblong effect. I'd say about 12 feet long and about 12—not 12 feet. I was thinking of yards. Let's say about 15 feet long and I'd say about 5 feet wide.

Q. How many entrances to the store are there, Mrs. Korn?

A. One.

Q. Is there a counter in the store?

A. Yes, one counter almost the full length of the store.

Q. Now, Mrs. Korn, directing your attention to approxi-

[fol. 7] mately 12:40 p.m. of the 24th day of January 1963, do you recall whether or not at that time you were in your store?

A. I was in my store with my clerk at that time.

Q. What is your clerk's name?

A. Joe Davis, Jr.

Q. At that time was there any customer in the store?

A. Not at that time.

Q. Now, did there come a time in that—approximately at 12:40 or around there, that anything unusual happened in your store?

A. Yes.

Q. Would you describe now, Mrs. Korn, keeping your

voice up so we can all hear you, what, if anything, unusual happened that day at that time?

A. I was standing at the counter when the defendant came into the store, asking me for four pork chops. I then addressed this to my clerk then, Joe Davis, who weighed up the four pork chops. He had to go to the counter, almost the rear of the store. When he came back I asked him how much were they, and when we put the package on the counter this defendant was right opposite me across the counter and he looked me square in the face, he says I don't want those D pork chops. And I was looking at his face. So he looked down and there was a gun pointing directly at me.

[fol. 8] Q. What happened then, Mrs. Korn, if anything?

A. He said I don't want those D pork chops, I want your money. Whereby, I turned around, opened my cash register and told him to help himself.

Q. What happened then?

A. He said put the money in a bag, so I took a bag and I started putting the bills in the bag.

Q. Go on.

A. With that my husband, who was at the market at that time, opened the door and looked in and saw me putting the money in the bag. Generally children come into a store and purchase articles and you put the change in a bag so they don't lose it. Well, he looked around, there was no children, and he said what's going on here?

Mr. Jones: Objection to what.——

Mr. Treanor: Don't tell us what your husband said, Mrs. Korn.

The Court: If it was said in the defendant's presence it is part of the res gestae. That would be admissible.

By Mr. Treanor:

Q. Continue, Mrs. Korn.

A. So in a dialect, when he was entering the store, I told him to get out, there is a man here with a gun. Well, he probably, the excitement of seeing me putting money in the [fols. 9-11] bag, didn't hear me, but he came right into the store. And the defendant was standing right under a light, and when you come in it maybe looks dim, so he turned on the light.

Q. Who did that?

A. My husband. The light is on a chain. When he pulled the light the defendant turned around, saw my husband and fled.

Q. Did he take anything?

A. No.

Q. Can you describe the gun that you say was pointed at you?

A. It just looked shiny. I don't know anything about guns. I just saw it was a gun and it looked shiny to me.

Q. Were you able to tell it was a gun or appeared to be a gun?

A. Oh, yes, it was a gun.

* * * * * * *

[fol. 12] Q. After the man left your store, Mrs. Korn, what did you do then?

A. My husband—as soon as he left, my husband, not thinking, ran after him in the street and was yelling for police. Then he came back into the store and he says we should call the police.

Mr. Jones: Objection, Your Honor; a statement made outside the presence of the defendant.

The Court: Well, of course, it is immaterial. I am going to sustain the objection. Make your questions more specific.

Q. What did you do then, Mrs. Korn, if anything?

A. Called the police.

Q. Did you describe this man to the police?

The Court: No, we don't need all that. That is all for cross-examination. You have got her prima facie testimony.

Q. Now, did the police come?

[fol. 13] A. Almost immediately.

Q. Did there come a time, Mrs. Korn, when you saw this man again?

A. Yes, sir.

Q. How long after he had left the store did you see him again?

A. Oh, it seemed like about ten minutes.

Q. Did he come into the store?

A. He was brought into the store by an officer.

Q. Do you know what that officer's name was?

A. I can't recall. He is in the witness room. I don't know his name.

Q. Was he in uniform?

A. No, sir.

Q. Now, what happened then, when he brought him in?

Mr. Jones: Your Honor, may I address an objection? Your Honor, I object to any testimony indicating a prior identification on the grounds it would be——

The Court: Objection overruled.

Mr. Jones: —on the grounds of accrediting the witness.

By Mr. Treanor:

Q. What happened, Mrs. Korn, after the policeman brought the defendant into the store?

[fols. 14-16] The Court: Brought the man into the store.

Mr. Treanor: I'm sorry, Your Honor; brought the man in.

The Witness: They asked me if that was the man who had tried to hold me up, and I said yes.

By Mr. Treanor:

Q. Do you see the man in the courtroom today, Mrs. Korn?

A. Yes, sir, he is sitting right over there.

Q. And how is he dressed today?

A. How is he dressed today?

Q. Yes.

A. Well, he's just got a blue shirt on.

Mr. Treanor: May the record indicate, Your Honor, that Mrs. Korn has identified the defendant, Melvin Jenkins?

The Court: The record may so indicate.

Mr. Treanor: I have no further questions.

The Court: Any cross-examination?

Cross-examination.

By Mr. Jones:

. . . . . .

[fol. 17] Q. Now, did you notice the clothing of the man that entered the store?

A. No, sir.

Q. Do you recall anything about a coat that he had on?

A. Well, he seemed to have a three-quarter coat on.

Q. Can you describe that coat any more fully?

A. No, sir; just a coat, just knowing that he was covered with a coat.

Q. Did you notice anything about his shoes?

A. No, sir.

Q. Did you notice whether he had a cap on?

A. It looked like he had a soft hat on.

Q. Now, you said that shortly afterward the police brought a man back to the store?

A. Uh-huh.

Q. Did you notice what kind of a coat that man had on?

A. He wasn't wearing the same coat.

Q. It was a different coat?

A. Different coat.

[fols. 18-23] Q. How would you describe that coat?

A. Well, this coat was more of a zippered suede or leather effect, short, hip length.

Q. Did you notice whether or not that man had a cap on?

A. No, then I didn't.

Q. Did you notice what kind of pants or trousers that man had on?

A. No.

Q. And are you positive that he had a different coat, you saw a different coat when the police brought this man back?

A. Yes, sir.

. . . . . .

[fol. 24] JOSEPH DAVIS, JR. called as a witness by the Government, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Treanor:

Q. Sir, would you state your full name?
A. Joseph Davis, Jr.
Q. How old are you, Mr. Davis?
A. Eighteen.
Q. Are you employed?
A. Yes, sir.
[fol. 25] Q. Where?
A. At Steak Ranch.
Q. On the 24th of January——

The Court: Employed where?
Mr. Treanor: The Steak Ranch was his answer.

By Mr. Treanor:

Q. On the 24th day of January, Mr. Davis, where were you employed?
A. At Phil's Market.
Q. How long had you been working there?
A. About a month or two.
Q. Directing your atention, Mr. Davis, again to the 24th of January, were you working there approximately 20 minutes of one in the afternoon?
A. I was.
Q. Do you recall at that time anything unusual happening in Phil's Market?
A. Yes.
Q. Tell us now, keeping your voice up, Mr. Davis, so that we can all hear you, nice and slowly, what happened, if anything than usual, that day?
A. A man came in. He ordered some chops and I waited on him. As I brought the chops up to the front he pulled a gun out and he told Mrs. Korn that he didn't want the chops, [fol. 26] he want the money. So she opened the drawer and told him to help hisself, and he told her to put it in a bag, so she put the money in a bag, and while she was putting the

money in a bag her husband walked in the door and asked what was going on. So he walked over and pulled on the light, and the defendant, he turned around and looked at the man and ran out the door.

Q. Did you see this man again that day?

A. I did.

Q. When was that?

A. About five minutes later a plain clothes detective brought him back.

Q. Mr. Davis, was he dressed any differently when he was brought back than when you first saw him come into Phil's Market?

A. Yes, sir.

Q. What difference was there?

A. He had on a shorter coat and it was a tan leather jacket. He didn't have on a hat.

Q. Was it the same man?

A. Yes, sir.

Q. Do you see that man in the courtroom today, Mr. Davis?

A. Yes, sir.

Q. What does he have on?

[fols. 27-30] A. He have on a blue shirt.

Mr. Treanor: May the record indicate, Your Honor, that the witness has identified——

The Court: Has he pointed to the man?

Mr. Treanor: Well, he looked that way.

The Court: Well, that is not enough.

By Mr. Treanor:

Q. Would you point to him, please, Mr. Davis?

A. The defendant over there (indicating).

The Court: He has pointed to him now. The record may indicate that he has identified the defendant.

Q. Had you ever seen him before that day, the 24th of January 1963?

A. No, I haven't.

Mr. Treanor: That is all the questions I have.

The Court: Any cross-examination?

Cross-examination.

By Mr. Jones:

. . . . . .

[fols. 31-33] Q. Now, when he first came in, this man, you say that he had a long coat on?

A. That's right.

Q. Can you describe the coat any further?

A. I think it reached down to his knees and it was kind of white or tan.

Q. Kind of which?

A. White or tan.

Q. Was it leather or suede or was it khaki?

A. I think it was suede.

[fols. 34-36] Q. You said that when this man was brought back to the store, that he had a different coat on?

A. That's right.

Q. Would you describe that coat?

A. It was a short leather coat.

Q. What color?

A. Brown.

Q. What about a hat, did he have a hat?

A. No, he didn't.

Q. And how long after he left did he come back in?

A. After he left?

Q. Yes

A. Well, about five minutes later the policeman brought him back.

Q. Could it have been any less than five minutes?

A. It's possible.

. . . . . .

[fol. 37] The Court: I think we will recess this trial at this time until Monday morning. Ladies and gentlemen of the jury you will be excused at this time until Monday morning at 10 o'clock. Please be back in the courtroom a few minutes before 10 o'clock on Monday morning.

(At 3:50 p.m. trial stood in recess, to reconvene 10:00 a.m., May 27, 1963.)

[fol. 38] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 208-63

[Title omitted]

Transcript of proceedings—May 27, 1963

Washington, D. C.

The above cause came on for further trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury, at 10:00 a.m.

APPEARANCES:

For the Government: John H. Treanor, Jr., Esq., Assistant United States Attorney.
For the Defendant: Thomas R. Jones, Esq.

[fol. 39] Proceedings

The Deputy Clerk: United States vs. Melvin C. Jenkins.
The Court: You may bring in the jury.

(The jury resumed the jury box.)

The Court: You may proceed, Mr. Treanor.
Mr. Treanor: Officer Demoro.

JEROME DEMORO called as a witness by the Government, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Treanor:

Q. Would you state your full name, please?
A. Jerome Demoro.
The Court: How do you spell your last name?
The Witness: D-e-m-o-r-o.

Q. What is your duty assignment?

A. I am detailed to what is known as the Fifth District Tactical Force.

Q. Are you a member of the Metropolitan Police Department?

A. Yes, I am.

Q. And to which precinct are you assigned?

A. No. 12.

[fol. 40] Q. How long have you been a member of the Metropolitan Police Department?

The Court: I don't think that is necessary. We don't do that, Mr. Treanor. On cross-examination they can ask him that if they want to know.

By Mr. Treanor:

Q. Directing your attention, Officer Demoro, to the 24th day of January——

The Court: You can ask him what his duties are and so on.

Q. What is the nature of your duties with the Metropolitan Police Department?

A. We cruise in private automobiles, in casual clothing, not in uniform, and cruise for housebreakers, robbery suspects and stolen automobiles.

Q. Directing——

The Court: What is the name of the squad to which you are assigned?

The Witness: It's called the Fifth District Tactical Force.

Q. Directing your attention to the 24th day of January 1963, were you so assigned then?

A. Yes, I was.

Q. And directing your attention to approximately 12:40 [fol. 41] p.m., do you recall being on duty at that time?

A. Yes, I do.

Q. Do you recall at that time being in the vicinity of 19th and C, Northeast?

A. Yes, sir, we were.

Q. Were you on duty with someone else?

A. Yes, sir.

Q. Who was that?

A. Officer George F. Briggs, from the 9th Precinct.

Q. Briggs?

A. Yes, sir.

Q. Were you traveling on foot?

A. No, sir, we were in a private auto.

Q. Whose automobile?

A. Officer Briggs'.

Q. Now, again directing your attention to approximately 12:40 p.m., did there come a time when you received a radio call for a run to 301 12th Street, Northwest?

A. Yes, sir.

Q. Now, starting with that first call, Officer Demoro, would you tell us what calls you received and what you did thereafter?

The Court: No, he can't state what calls he received. That would be hearsay.

Mr. Jones: Your Honor, may I inquire whether that——

[fol. 42] The Court: Speak up, Mr. Jones.

Mr. Jones: May I inquire whether the officer meant 301 12th Street, Southeast?

The Court: You may not inquire at this time.

By Mr. Treanor:

Q. Officer Demoro, did you receive a call for 301 12th Street, Southeast or Northeast?

A. Southeast.

Q. Thank you. Now, as a result of receiving this call what did you do?

A. We went immediately to East Capitol and 12th Street, Northeast, that would be on the northeast side of Lincoln Park, and stopped.

Q. In the automobile?

A. In the automobile.

Q. Continue, please.

A. We parked there and waited for a general broadcast to come out, which came out at approximately 12:43. The general broadcast described——

Q. Don't tell us that.

The Court: Don't tell us what the general broadcast was. Just tell us what you did and what you saw.

A. We parked. We observed the defendant, Melvin Jenkins, approximately 20 feet in the park. He was going [fol. 43] north towards 12th Street. He showed signs of breathing heavy. There was vapor coming from his mouth, as though he had been running. He seemed very nervous, he kept looking back. We observed him cross East Capitol Street in front of the car and proceed down 12th Street to the mouth of the alley and he turned west into the alley towards 11th Street. He went in approximately 20 feet or so, turned around, took three or four steps back, turned again and ran towards 11th Street, at which time we gave chase in the auto and stopped the defendant as he turned onto the sidewalk on 11th Street. We placed him under arrest. We took him back to the scene, where he was identified. He was then taken to No. 5.

The Court: When you say he was identified, tell us just what happened and what was done and what was said.

The Witness: When we got back to the scene—well, first, we asked him or we told him, You could help us by coming back with us. We placed him into the back seat of the car after a preliminary search of his person for weapons. We took him back to 301 12th Street, Southeast, at which time he refused to get out of the car. We ordered him from the car and myself and two uniformed men took him into 301 12th Street, Southeast, where Mrs. Sadie Korn and Joe Davis, Jr., the Clerk, both identified him as the man who had been in there previously with the gun.

[fol. 44] By Mr. Treanor:

Q. Was Mr. Korn there?

A. Yes, sir, he was.

Q. Was he able to identify the defendant?

A. He said he wasn't sure, that his wife would have to see him.

Q. Were there other police cars there when you arrived?

A. Yes, sir, there were.

Q. At 301 12th. After being identified by Mrs. Korn and Joe Davis did the defendant say anything?

A. He says, I don't know what you are talking about.

Mr. Treanor: I believe that is all I have.

The Court: Any cross-examination?

Cross-examination.

By Mr. Jones:

. . . . . .

[fol. 45] Q. Officer, where were you standing when you first saw the defendant?

A. I was sitting in the car, wasn't standing.

Q. Where were you sitting in the car?

A. On East Capitol Street at 12th, on the east side of the intersection.

[fol. 46] Q. And how far was the defendant from you when you first observed him?

A. He was on the other side of East Capitol Street, approximately 20 feet or so into the park.

Q. Do you recall noticing what he wore at that time?

A. Yes, sir; he had on a suede leather jacket with a zipper front, tan trousers. As to whether he was wearing a hat or not I am not sure.

Q. Did you notice the length of the coat?

A. Yes, sir; it was pulled down—it was a waist-length jacket that had been pulled down in the front and yet was at his waist in the back, as though he had had his hands in the pockets and pushed the front down.

Q. It was a short coat, was it?

A. Yes, sir, it was.

Q. And it was a leather surface coat?

A. Yes, sir.

Q. When you first saw him how fast was he running?

A. He wasn't running.

Q. He was walking?

A. Yes, sir.

Q. And was he walking along the sidewalk when you first saw him?

A. Yes, sir.

[fol. 47] Q. Now, how far from the point that you first saw him did you stop him and question him?

A. He had crossed East Capitol, gone as far as the first alley on 12th Street and proceeded through that alley to 11th.

Q. Could you estimate the distance?

A. Well, it would be one city block from 12th to 11th and

approximately, I would say, about 300 feet from the park over.

Q. Did he look back toward you during that time?

A. Yes, sir, he did, several times.

Q. Did he commence to run then?

A. Only when he reached the alley.

Q. Did you undertake to search him in the alley?

A. No, sir; he had already gotten through the alley to 11th Street, and when we stopped him on 11th Street my partner and myself both jumped from the car and hollered police, and he stopped and turned around, facing us, and my partner went towards him and as he approached the defendant threw both arms straight out and my partner went down his sides.

Q. Did you search him yourself?

A. No, sir, I did not.

Q. Did you observe your partner recover any weapon from him?

[fols. 48-51] A. No, sir, I did not.

Q. And did you search him at any time later?

A. I personally did not.

Q. Did you observe anyone else search him at any time later?

A. No, sir, I didn't.

The Court: What is it you want to know, Mr. Jones?

Mr. Jones: I want to know, Your Honor, whether or not a weapon was recovered from this——

The Court: Don't make a mystery of it.

Mr. Treanor, was any weapon found on the defendant's person when he was arrested?

Mr. Treanor: No, Your Honor.

* * * * * * *

[fol. 52] RUTH H. M. MCLEISH called as a witness by the Government, having been duly sworn, was examined and testified as follows:

Direct examination

By Mr. Treanor:

Q. Ma'am, I'd like you to answer my questions now in a loud voice so that we can hear you all over the courtroom.
What is your name?
A. Ruth Halsey Morgan McLeish.
Q. Are you Mrs. McLeish or Miss?
A. Mrs.
Q. Where do you live?
A. 428——

The Court: What is your first name?
The Witness: Ruth.
The Court: Which count of the indictment is this directed to, Mr. Treanor?
Mr. Treanor: This is directed to the first count.
The Court: Very well, you may proceed.

Q. Where do you live, Mrs. McLeish?
A. 428 Kenyon Street, Northwest.
Q. In the District of Columbia?
A. Yes.
[fol. 53] Q. Now directing your attention, Mrs. McLeish, to December 27, 1962, were you employed on that date?
A. Yes, I was.
Q. Where?
A. At 138 7th Street, Northeast.
Q. What establishment is located there?
A. High's Dairy Products.
Q. High's?
A. High's Store.

The Court: You might fix the venue if you want to.

By Mr. Treanor:

Q. Is that in the District of Columbia, Mrs. McLeish?

A. Yes, it is.

Q. Now, were you working approximately 6:45 p.m. on that date?

A. Yes, I was.

Q. Was there anyone working with you?

A. Yes, Mrs. Hodges.

Q. What is the general nature of your duties there at High's?

A. Well, it's a clerk, selling. I am a clerk, sales clerk.

Q. Now, did there come a time just shortly prior to 6:45 when you left the store?

[fol. 54] A. Yes; I was on my lunch hour and I went out to the Safeway to buy some things.

Q. Approximately how long were you gone?

A. Oh, about 10 or 15 minutes.

Q. Now, as you returned to the store, Mrs. McLeish, did you see anyone standing out in front of it?

A. Yes, I saw a man.

Q. Do you see that man in the courtroom today?

A. No; you are in the way.

Q. Please?

A. Yes, he is here; that man right in the middle.

Q. In the middle?

A. In the middle of those two men.

Q. What is he wearing, Mrs. McLeish?

The Court: Let him put his hands down so the witness can see him.

A. He was wearing——

Q. No; what is he wearing now?

A. He is wearing a blue shirt.

Mr. Treanor: May the record indicate, Your Honor, that Mrs. McLeish has identified the defendant?

The Court: The record may so indicate.

By Mr. Treanor:

Q. Now, when you saw the defendant, Mrs. McLeish, [fol. 55] standing in front of the High's store what, if anything, was he doing?

A. He was looking to and fro. He was looking up the street and down. I thought he was a customer and I was going to speak to him as I approached him, and when I got close enough I saw he wasn't a customer, so I just continued on into the store.

Q. How close did you come to him?

A. I passed right—I could touch him, I was that close to him.

Q. Did you look at his face?

A. Yes, I looked at him because I thought he was one of our customers.

Q. And what did you do then?

A. I kept on going. I went on in the store, took off my coat and hat, came back in the store to eat my lunch.

Q. Was there anyone else in the store now when you returned?

A. Mrs. Hodges was waiting on a little boy about seven or eight years old. As soon as the little boy left the store this man came in.

Q. Continue now and tell us what, if anything, happened then.

A. Well, he just pointed a gun at Ruth and she opened [fol. 56] the drawer and she said, Do you want the change? And he said, No; lady, just the bills. I walked around her and looked at him. I was just looking at him. I didn't say anything, didn't do anything. I just looked at him. He got the money and ran out of the store. Then I called the police.

Q. How close did you come to him in the store?

A. I don't know. I was very close to him. I guess about maybe to the end of this desk right here (indicating).

Q. Would you say a few feet?

A. Just a few feet away from him.

Q. Were you behind the counter, Mrs. McLeish?

A. Yes, I was.

Q. And he was on which side?

A. And he was in front of the counter.

Q. Are you able to describe the gun that you saw?

A. No, because I just saw a small part of the barrel, the end of it.

Q. Did you hear the defendant say anything else except just the bills?

A. No, he didn't say anything, just the bills, just the bills, lady. That's what he said.

Q. Had you ever seen this man before?

A. No, I never seen him before.

Q. Now, did there come a time after that date, Mrs. [fols. 57-58] McLeish, that you saw him again?

A. Yes, I saw him on February 7th at the Grand Jury.

The Court: You saw him when?

The Witness: On February 7th.

By Mr. Treanor:

Q. Where did you see him?

A. In the Commissioner's office.

Q. Did you identify him then?

A. No, they didn't ask me to identify him, but I knew him.

Q. Was it the same man?

A. Yes.

Mr. Treanor: I have no further questions, Your Honor.

The Court: Any cross-examination?

Cross-examination.

By Mr. Jones:

[fol. 59] Q. Did you notice on that date, December 27th, 1962, whether or not the defendant had—or whether or not this individual whom you have identified as the defendant had a cap on?

A. He had a hat on with a bill or a beak, I guess they call it, and a knitted part that comes down over your ears in cold weather. I don't know what they call those kind of caps.

Q. Did that cover any part of his face?

A. No.

[fol. 60] Q. But it covered his ears?

A. No, he didn't have the knitted part down. The knitted part was up. But it covered his head.

Q. Did it cover his entire head?

A. Yes.

Q. Did you notice any unusual marks or scars about his face?

A. No, only that his eyes were large.

Q. Did you notice anything about his shoes?

A. No, I couldn't see his feet.

Q. Now, how far were you standing from the cash register when he first—when you saw this man first enter?

A. I don't know. I was on the opposite side of the cash register and I walked around to the cash register.

Q. Well, was it a matter of a few feet?

A. Yes.

Q. And then you said, I think, that certain money was taken from the register?

A. Yes.

Q. Where was the money put?

A. Miss Hodges put it in a bag.

Q. What kind of a bag?

A. A paper bag.

Q. Did you notice whether this individual touched the [fols. 61-62] counter or touched the cash register?

A. No, he didn't touch anything. He just stood there and she put the money in the bag and he left the store.

Q. Could you estimate how long he was in the store?

A. About maybe three to five minutes. It didn't take him long.

Q. Could it have been shorter than three to five minutes?

A. No, I don't think so.

* * * * * * *

[fol. 63] Ruth Hodges called as a witness by the Government, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Treanor:

Q. Ma'am, I'd like you to keep your voice up now so [fol. 64] we can hear you all over the courtroom.

What is your name?

A. Ruth Hodges.

Q. Are you Mrs. Hodges or Miss?

A. Miss.

Q. Miss or Mrs.?

A. Miss.

Q. Where do you live, Miss Hodges?

A. 311 17th Street, Southeast.

Q. Directing your attention to approximately 6:45 p.m. on the 27th day of December 1962, were you employed then?

A. Yes.

Q. And were you working then?

A. Yes.

Q. Where?

A. At 138 7th Street, Northeast.

Q. What is the name of that place?

A. High's Ice Cream Store.

Q. How long have you worked there?

A. About 13 years.

Q. Who was in charge of the store that evening, Miss Hodges?

A. I was.

Q. Was there another employee working?

[fol. 65] A. Yes.

Q. Who was that?

A. Mrs. Ruth McLeish.

Q. Directing your attention now again to approximately 6:45 p.m., did there come a time around that time that anything unusual happened in the High's store?

A. This fellow came in——

Q. Keep your voice up.

A. This fellow came in with a gun and just leaned over the counter and pointed it towards me, and I started giving him the money and he ran out.

Q. Did this man say anything to you?

A. He didn't say a thing. When I gave him the bills I asked him did he want the change and he said, Just the bills, lady. He did say that, Just the bills, lady.

The Court: Part of the witness' answer was mumbled a little bit. I am going to have the Reporter read it.

(The last answer was read by the Reporter.)

By Mr. Treanor:

Q. Are you able to describe the gun that this man had?
A. Yes.
Q. What did it look like?
A. It was short and looked sort of gray-ish in the light.
[fol. 66] Q. How much of the gun were you able to see?
A. Just the end of the barrel.
Q. Where were you standing when you saw this gun?
A. Near the cash register.
Q. Where was Miss Hodges—I'm sorry—Mrs. McLeish?
A. She was on the righthand side of me whe he first came in and she went behind me on the lefthand side.
Q. Did this man stand across the counter from you?
A. Yes.
Q. At this time was there anyone else in the store?
A. No.
Q. Had you ever seen this man before?
A. No.
Q. Until you came to court for the trial of this case on Friday had you seen him since that date, since the 27th of December? Between the time of the trial and the time of the holdup of your store did you see him in between?
A. No.
Q. Now, how much money did you give him?
A. Around $38, I think.

The Court: How much?
The Witness: Around 38.

By Mr. Treanor:

Q. How did you arrive at that figure?
[fol. 67] A. We checked the cash register afterwards.
Q. Do you recall the denominations?
A. No.
Q. Did you give him any change?
A. No.
Q. Did this money belong solely to High's, as far as you know?
A. Yes.
Q. Was this money ever recovered?
A. No.

Mr. Treanor: I have nothing further.

The Court: Any cross-examination?

Mr. Treanor: I'm sorry, Your Honor. May I ask one final question?

The Court: Surely.

By Mr. Treanor:

Q. Ma'am, do you see the man that you have told us about who came into your store on the 17th day of December, do you see him in the courtroom now?

A. Yes.

Q. What is he wearing and where is he sitting?

The Court: No; just have her point to him.

Q. Would you point to him, please?

A. Sitting over there (indicating.)

[fol. 68] Q. What is he wearing?

A. A blue shirt, all I can see.

Mr. Treanor: May the record indicate, please, Your Honor, that Miss Hodges has identified the defendant?

The Court: The record may so indicate.

Mr. Treanor: I have nothing further.

The Court: Any cross-examination?

Mr. Jones: May I ask if Mr. Treanor has any statements from this witness?

Mr. Treanor: The Government has no statements by this witness, Your Honor.

The Court: Very well.

Cross-examination.

By Mr. Jones:

Q. Now, Mrs. Hodges, shortly after this incident occurred did the police arrive at the store?

A. Yes.

Q. And did they ask the people involved whether they had a description of this individual?

A. Yes.

Q. And were you able to give the police a description?

A. Yes.

Q. What description did you give them?

A. He had on a hat that come down over his ears, turned [fol. 69] up, and a car coat, and that's all I saw of him.

Q. Were you able to give a description of his features?

A. He was fat, big and fat; just fat.

Q. Do you recall having a conversation with a Mr. Savage of the Legal Aid Agency on April 9th, 1963?

A. No.

Q. Do you recall an investigator of the Legal Aid Agency talking to you and asking you if you knew anything about this case?

A. No.

The Court: What is your answer?

The Witness: No.

By Mr. Jones:

Q. Well, now, you are Mrs. Ruth Hodges of 311 17th Street, Southeast, is that correct?

A. Yes.

Q. And you do not recall having any such interview with any investigator of the Legal Aid Agency?

The Court: She has already answered your question.

Q. Now, did you make this description from your own observation or did you base it upon something Mrs. McLeish told you?

A. No, my own observation.

Q. You are positive of that?

[fol. 70] A. Uh-huh, yes.

Q. And you are positive again that you were able to give the police a description?

A. Yes.

Q. And again you say that this man here was the one that was in the store on that day?

A. Yes.

Mr. Jones: May we approach the bench, please, Your Honor?

The Court: Yes, indeed.

(At the Bench:)

Mr. Jones: Your Honor, I intend to offer a prior inconsistent statement that was made to a Legal Aid investigator, but I, of course, did not subpoena him because I was not aware that the statement would be inconsistent. Therefore, I would, if possible, like to try to contact him and have him standing by.

* * * * * * *

[fol. 71] Q. Isn't it true, Mrs. Hodges, that you were actually unable to identify this defendant on a prior occasion?

The Court: You will have to specify the prior occasion. You can't ask enigmas like that.

Q. Was there a prior occasion when you were unable to identify this defendant?

The Court: No, no; you will have to make clear what you are referring to. You cannot mystify a witness, Mr. Jones.

Mr. Jones: Very well, Your Honor, I have no further [fol. 72] questions at this time.

The Court: Very well.

Redirect examination.

By Mr. Treanor:

Q. Do you recall anyone at all other than the police coming to talk to you about this case, Miss Hodges?

A. No, I can't remember no one but the police.

Q. Did anyone come to talk to you after the day of the events; that is, after the 27th day of December did any policeman come to talk to you then?

A. Not as I can recall.

Q. Did anyone call you at your home or at the store?

A. None other than tell me to meet here, to come here. I mean to the court, District building.

Q. Have you ever told anyone, that you can recall, that you could not identify the defendant?

A. No.

Mr. Treanor: I have nothing further, Your Honor.
The Court: You may step down.

(Witness excused)

* * * * * * *

[fol. 73] Mr. Treanor: The Government rests, Your Honor.
The Court: Very well. You may proceed, Mr. Jones.
Mr. Jones: I would like to call Mr. Phillip Korn, please.

Phillip Korn called as a witness by the defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jones:

Q. Would you state your name, please, sir?
A. Phillip Korn.
Q. And where are you employed?
A. For myself.
Q. Where?
A. 301 12th, Southeast.
[fol. 74] Q. And what are those premises known as?
A. A grocery, grocery store.
Q. And are you an owner?
A. Yes, sir.

The Court: What are they known as did you say?
The Witness: A grocery store.

By Mr. Jones:

Q. Would you give us the name of that grocery store?
A. Phil's Market, P-h-i-l-'s.
Q. Do you own that store yourself or is there a co-owner with you?
A. My wife.
Q. And your wife's?
A. Sophie Korn.
Q. Now, were you there on January 24th, 1963?

A. Yes, sir.

Q. Do you recall coming into that store about, oh, some time after noon on that date?

A. About one o'clock I came into the store.

Q. Now, where had you been before you came into the store?

A. In the market.

Q. And what was the first thing that you did when you entered the store?

[fol. 75] A. I entered the store and I seen my wife was putting money in a bag.

Q. And what did you do?

A. I seen the boy was in the corner and my wife was *putting* money in the bag. It looked kind of funny to me. Usually when my wife puts money in a bag it's when the kids are around and you give them the change or something, you put it in the bag. So I looked around and see there was no kids. So I seen something funny was going on so I put the light on.

The Court: Speak a little louder.

A. I put the light on.

Q. Did it appear to you to be a little dim in there?

A. Yes. When you come from the outside it looked, you know. When I put the light on the man looked at me and he ran out.

Q. Now, how close were you to the man?

A. Right in the back of him.

Q. And when he looked at you was he facing you?

A. No. When he looked at me he did face me and he ran out.

Q. Now, could you say one way positively or not whether or not this man here is the man that you saw?

A. I couldn't say for sure. He wore a different coat when they brought him in.

[fol.s 76-79] Q. But you couldn't say for sure one way——

The Court: He has answered your question. Don't keep repeating.

By Mr. Jones:

Q. Is your vision satisfactory?

A. Yes.

Q. Now, were you present—strike that. Do you recall being present in the store when the police brought a man back?

A. I was outside and I seen the police cars coming and an officer come over and says is that the man? I called the police before that. And the officer asked me if that's the man. I says the man that held me up, I says, wore a long overcoat. So I says I cannot recognize him, but I says take him in the store, maybe my wife and the boy will recognize him.

[fol, 80] FRANCIS N. SAVAGE called as a witness by the Defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jones:

Q. Would you state your name, please, sir?

A. Francis N. Savage.

Q. And where are you employed?

A. Legal Aid Agency.

Q. And in what capacity are you employed there?

A. As an investigator.

[fol. 81] Q. And what are your duties as an investigator?

A. I investigate—rather, I attempt to locate witnesses, interview them in regard to cases as assigned by the Court and to our attorneys.

Q. And how long have you been working in that capacity?

A. About two and a half years.

Q. Have you had any investigative experience prior to that?

The Court: He is not testifying as an expert, I presume. You don't have to qualify him as an expert.

By Mr. Jones:

Q. Now, Mr. Savage, do you recall conducting an investigation in the case of United States vs. Melvin Jenkins?

A. I do.

Q. And did you make a report of that investigation?

A. Yes.

The Court: I don't think that is relevant, whether he made a report or not. Just get to what you wish to bring out, to the crux of the matter.

Q. On April 9th of 1963, sir, did you have an occasion to interview a Mrs.—Miss Ruth Hodges?

A. I did.

Q. And how was that interview conducted?

A. By telephone.

[fol. 82] Q. And do you recall asking her any questions relative to the identification of the defendant, Melvin Jenkins?

The Court: Just say yes or no, please.

A. Yes, sir.

Q. What were those questions and, if you recall, what were her replies?

The Court: Now just a moment. I am going to ask counsel to come to the bench.

(At the Bench:)

The Court: I am going to exclude this at the present posture of the case. Whenever you want to offer a contradictory statement that you allege was made by a witness you first have to confront the witness on cross-examination with that contradictory statement and ask her whether the witness made it.

* * * * * * *

[fol. 83] Mr. Jones: Your Honor, I thought that the interview was conducted person to person when I asked the question.

The Court: By phone.

Mr. Jones: But I now, upon talking to Mr. Savage, he advised me that the interview was conducted by phone.

The Court: Then you must also confront the witness with the specific statement, the occasion of the statement, what you claim was said and to whom.

Now at the present posture of the case I am going to [fol. 84] exclude that.

Is Ruth Hodges still here?

Mr. Treanor: Yes, she is, Your Honor.

The Court: If you want to recall her for additional cross-examination I will let you do it.

* * * * * * *

[fol. 85] The Court: You are asking leave to withdraw Mr. Savage temporarily and to reopen the cross-examination of Ruth Hodges, is that it?

Mr. Jones: That is correct, Your Honor.

The Court: Very well, leave is granted.

Mr. Jones: Thank you.

(The witness Francis Savage temporarily withdrew from the witness stand.)

Ruth Hodges recalled to the witness stand by the Defendant, having been previously duly sworn, was examined and testified further as follows:

Further cross-examination.

By Mr. Jones:

Q. Miss Hodges, do you recall receiving a telephone call [fol. 86] on the 9th of April 1963 from a Mr. Francis Savage, an investigator of the Legal Aid Agency?

A. Yes.

Q. And do you recall telling Mr. Savage over the telephone that you could not——

The Court: Don't ask whether she recalls. You may ask her, Did you tell him so and so. Because when you say do you recall telling him, that assumes that she did.

By Mr. Jones:

Q. Did you tell him that you could not identify the defendant, Melvin Jenkins, as being the person that held up High's Ice Cream Store on December 27th, 1962? Do you recall—strike that. Did you tell Mr. Savage that on April 9th, 1963?

A. I told him that I didn't get a description of him all over, I did his face, and that Miss McLeish was getting—she was standing beside me so she got a better description than I did, that he consult her. But I saw his face.

Q. But the question is, did you tell him that you couldn't identify him?

A. Yes.

Q. You did.

The Court: Did you tell Mr. Savage that you could not identify this defendant as being the man who held up the store? Did you tell him that? Do you understand that?

[fol. 87] The Witness: I told him that I could his face part, but that Mrs. McLeish got a better description of him.

The Court: We are asking you whether you told Mr. Savage that you could not identify this defendant. Did you tell him that?

The Witness: Well, no, I didn't tell him.

Mr. Jones: Very well. Thank you.

May I recall Mr. Savage?

The Court: Have you any redirect, Mr. Treanor?

Mr. Treanor: I was thinking. I'm sorry,. Your Honor. Just one question, please.

The Court: Surely.

Redirect examination.

By Mr. Treanor:

Q. You were asked on cross-examination on your appearance when you took the stand a few months ago, fifteen minutes or so ago, if you had been approached by anyone from the Legal Aid. Did you know then what the Legal Aid meant?

A. No, I didn't understand that part.

Q. Do you know now?

A. Yes.

Mr. Treanor: I think that is all I have.
The Court: Very well, you may step down.

(Witness excused)

[fol. 88] Mr. Jones: Your Honor, at this time I would like to recall Francis Savage.
The Court: Very well, you may recall him.

Francis N. Savage resumed the witness stand and was examined and testified further as follows:

Direct examination (Continued)

By Mr. Jones:

Q. Mr. Savage——

Mr. Jones: Would Your Honor like me to repeat the prior testimony or start over again?
The Court: Don't repeat anything.

Q. Mr. Savage, do you recall having a telephone conversation with Mrs. Ruth Hodges?
A. I do.
Q. On April 9th 1963, relative to the case now on trial?
A. I do, sir.
Q. Do you remember whether she told you anything about the identification of the defendant as the individual who held up——

The Court: He is your witness. You must not ask him leading questions. You may ask him what did she say.

Q. What did she tell you with regard to the robbery of High's Ice Cream Store on December 27th, 1962?
[fol. 89] A. In regard to the identification she told me——

The Court: You are not limited to identification. What did she tell you about the robbery? That is the question.
The Witness: She told me that a man came in, held a gun and asked for the money.
The Court: Speak a little louder because some of the jurors are quite a distance away.

The Witness: That she was not able to identify the man and that Mrs. McLeish picked the man's picture from a group of pictures furnished her by the police,

Mr. Jones: That is all I have, Your Honor.

Cross-examination.

By Mr. Treanor:

Q. Mr. Savage, did you ask her for a particular description, that is, did you ask her what clothes the man had on?

A. No, sir, I did not.

Q. Did you ask her if she could remember his face?

A. No, sir.

Q. Did she give you any reason why Mrs. McLeish would be better able to furnish a description?

A. She simply said that she was very frightened and she just did what he said.

Q. She meaning Miss Hodges?

A. Mrs. Hodges, yes.

[fol. 90] Q. Did you ask her the specific question concerning her face?

A. Concerning her face?

Q. Right. That is, did you specifically ask her if she remembered the man's face?

A. I am not sure. I don't believe I did.

Q. How did you ask her for this description?

A. I asked her if she was able to identify the defendant. I asked her if she had picked him out of a line-up. She told me no, she was unable to identify him and that Mrs. McLeish did, in the manner in which I have already described.

Q. In other words, you didn't break it down, you didn't break the question concerning the description down to whether you meant a description by face or a description by clothing and appearance?

A. No, I did not.

Mr. Treanor: I have nothing further.

Mr. Jones: That is all. Thank you.

The Court: You may step down.

(Witness excused)

Mr. Jones: Would Your Honor indulge me for a moment, please?

The Court: Surely. Take whatever time you need.

(Pause.)

[fol. 91] Mr. Jones: May I call the defendant, please.

The Court: Surely.

Melvin C. Jenkins the Defendant, called to the witness stand, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jones:

Q. Will you state your name, please?

A. Melvin Carl Jenkins.

Q. Are you the defendant in this case?

A. I am supposed to be.

Q. And what is your address?

A. 1240 11th Street, Southeast.

The Court: Speak slowly and distinctly so we can all understand you.

Q. What is your occupation?

A. Dish washer, up on a truck.

The Court: Speak up loud.

The Witness: Dish washer and helper on soda trucks part-time.

The Court: Dish washer and what?

The Witness: Helper on soda trucks.

Q. How long have you lived in Washington?

A. All my life.

[fol. 92] Q. And how old are you?

A. Nineteen.

Q. Now, directing your attention to January 24 of 1963, do you recall that date?

A. Yes, sir.

Q. Do you recall whether or not you were arrested on that date?

A. I was.

Q. And where were you at the time?

A. Between 11th and East Capitol, 11th and Constitution Avenue.

Q. Do you recall what clothing you had on at the time?

A. A brown leather suede jacket, gray hat and gray pair of pants, trousers.

Q. And how long had you been wearing those clothes?

A. All day.

Q. Were you working that day?

A. No, I wasn't.

Q. Did you have a gun in your possession at all on that day?

A. No, I did not.

The Court: What day are you referring to?

Mr. Jones: January 24, 1963.

[fol. 93] By Mr. Jones:

Q. Have you ever been in a delicatessen at 301 12th Street, Southeast, known as Phil's Market?

A. No, I have not.

Q. But were you taken there at any time that day?

A. Yes, I was.

Q. Had you been there at any time previous to that?

A. No, I had not.

Q. Did you ever take any money from anyone in that delicatessen on that date?

A. No, I did not.

The Court: He is not charged with taking money from Phil's Market. He is charged with assault with intent to commit robbery.

Q. Did you try to take any money from anyone in that market on that date?

A. No, I did not.

Q. Did you commit this crime of assault with intent to rob upon Mrs. Korn?

A. Nope.

Q. Now, are you familiar with the High's Ice Cream Store on 7th Street?

A. Yes, I know where it's located.

Q. You know the location of the High's Store which these [fol. 94] witnesses have referred to in their testimony?

A. Yes.

Q. Have you ever been in there?

A. Yes.

Q. About how many times have you been there?

A. About two or three times.

Q. And what did you used to do when you went in there?

A. Get some ice cream or milk.

Q. Had you ever seen either of these two ladies that have testified from High's Ice Cream prior to December 27th, 1962.

A. Nope.

Q. Now, directing your attention to that date of December 27th, 1962, do you recall where you were at that time or what you were doing on that date?

A. No, I cannot.

Q. Do you recall whether you ever went into the High's Ice Cream Store on that date?

A. No, I can't say at that time, at the time.

Q. Could you tell the Court and the jury whether or not you committed this crime of robbery upon Mrs. McLeish in the High's Ice Cream Store on December 27th, 1962, at approximately 6:45 p.m.? Are you guilty of that crime?

A. No, I am not.

[fol. 95] The Court: No, that is not the way. The jury decides whether he is guilty. You may ask him whether he committed the robbery.

By Mr. Jones:

Q. Did you commit that robbery?

A. No, I did not.

The Court: Of course, you are pinpointing it to a particular moment, Mr. Jones. May I call your attention to the fact that I wouldn't do that if I were you.

Q. Did you commit that crime——

The Court: Did he commit the robbery.

Q. Did you commit that robbery about which these witnesses have testified with regard to High's Ice Cream Store?

A. No.
Q. And were you working on that date, if you recall?
A. No, I wasn't.
Q. When was the last date that you did work?
A. Around about November something, the middle part of November, last part of November.

The Court: You haven't worked at all since last November, is that it?
The Witness: November this past. I was in jail since then.
The Court: Not since November. Very well. He was [fol. 96] arrested in January.
Mr. Jones: That is correct.
The Witness: Yes, a month, a month and a half; something like that.

By Mr. Jones:

Q. Where was the last place that you worked?
A. Jim's Supermarket.
Q. And do you recall why you left that job?
A. Me and the manager couldn't get along?
Q. And directing your attention again to December 27, 1962, did you or did you not have a gun in your possession on that date?
A. No, I didn't.

Mr. Jones: Very well. Thank you.
The Court: Mr. Treanor.

Cross-examination.

By Mr. Treanor:

Q. Do you recall being arrested on the 24th of January?
A. Yes, I do.
Q. Do you remember about what time that was?
A. Around one, 1:30.

The Court: Speak up so everyone can hear you.
The Witness: Around one, 1:30.

Q. Where were you coming from when you were arrested?
[fol. 97] A. Home.
Q. Where is your home?

A. 1240 11th Street, Southeast.

Q. You were coming from your home?

A. Yes, I was.

Q. How long did it take you to get from your home to the place where you were arrested?

A. I don't know. I ain't never timed it.

Q. Well, approximately.

A. I couldn't say.

Q. How many blocks is it?

A. I really couldn't say.

Q. What is your address again?

A. 1240 11th Street, Southeast.

Q. 1240 11th?

A. Yes.

Q. Southeast. Well, that's only a few blocks, isn't it, from the corner of 11th Street and East Capitol? I'm sorry, the corner of 12th and East Capitol, isn't that just a few blocks from there?

A. Like I said, I ain't never——

Q. How long have you lived there?

A. About a year.

Q. You don't know how many blocks it is from your house [fol. 98] to the corner of East Capitol and 12th?

A. I have never counted it.

Q. Well, would you care to make a guess?

A. No.

Q. Would you say it was five blocks?

A. Like I said, I couldn't say what it was.

Q. Now, who was home when you left home?

A. My cousin and my aunt.

Q. What's your cousin's name?

A. Gertrude Brown?

Q. Gertrude Brown?

A. Uh-huh.

Q. And what's your anut's name?

A. Ruth Scott. Ruth something. I don't know her last name.

Q. Did you walk directly to the park from your home?

A. Uh-huh.

Q. Did you stop and talk to anyone along the way?

A. Nope.

Q. Did you go in any store along the way to buy anything or to look around?

A. Nope.

Q. You went directly toward the park then?

A. Yup.

[fol. 99] Q. Now, why did you start to run when you were in the alley between 12th and 11th Street?

A. I didn't run.

Q. You did not run?

A. Uh-huh.

Q. Did you hear Officer Demoro say that you went into the alley, then turned and ran?

A. Yes, I heard him.

Q. But that is not true?

A. Nope.

Q. Do you own a long overcoat, or did you then?

A. I have never owned an overcoat.

Q. Have you ever owned a three-quarter length car coat?

A. When I were six years old.

Q. Not since then?

A. Nope.

Q. On the 27th day of December 1963 do you recall whether you had a three-quarter length coat then?

A. Nope.

Q. What kind of a hat did you have last winter?

A. Last winter? I have a gray one like I have over at District Jail.

Q. Well, would you describe it to us?

A. It's a gray dress hat.

[fol. 100] Q. Did you at any time last winter own a cap with a beak on it and ear flaps?

A. Nope.

Q. On the 24th day of January what sort of shoes were you wearing?

A. These I have on.

Q. Boots?

A. Yes.

Q. What kind of pants did you have on that day?

A. A pair of gray slacks.

Q. And what color was the jacket?

A. Brown.

Q. What kind of a hat did you have on?

A. A gray hat.
Q. A gray hat?
A. Yes.
Q. Did you have that on when you were arrested?
A. Yes, I did.
Q. Now tell us what route you took from your house to the place where you were eventually arrested.
A. Went straight up N Street. I mean up 11th.
Q. Up 11th?
A. I started to go across the park, went across the park, went up 12th, then I cut through the alley from 12th over [fol. 101] toward 10th.
Q. How far did you have to walk up 11th from your home?
A. Like I told you before, I do not know. I haven't counted.
Q. And you can give us no idea of approximately how long it took you to leave your home until the time you got arrested?
A. No, I cannot.
Q. Would you say it was under an hour or do you think it might have been more than an hour?
A. It could have been under, it could have been over.
Q. You think it could have been over an hour?
A. It could have been under too.
Q. Well, what do you think it was?
A. I don't know. I don't own a watch.
Q. How far have you gone in school?
A. Seventh grade.
Q. Now, you heard Mrs. Korn say, did not not, that you came in and held a gun, pointed a gun at her?
A. Yes, I heard her.
Q. You didn't do that?
A. No.
Q. Did you go up that direction, up 11th—I'm sorry, up 12th Street? Were you up on 12th at all south of the park?
[fol. 102] A. I was up on 12th Street, northeast side.
Q. But not on the southeast side?
A. No, I did not.
Q. How about on 11th Street, Southeast?
A. I come up 11th Street leaving from home.
Q. Where were you going, incidentally?
A. I was going over my girl's house.

Q. Where does she live?
A. On 10th Street.
Q. Was she home that day?
A. I don't know. I didn't get there.
Q. Does she have a telephone?
A. Yes.
Q. You didn't call her before you left?
A. No, I did not.
Q. Now, you heard the police say, did you not, that you went into this alley between 12th and 11th?
A. Yes.
Q. And then you turned around?
A. Uh-huh.
Q. And were coming back and then you started to run and turned around again?
A. He said I started to run.
Q. Did you turn around in that alley?
[fol. 103] A. Yes.
Q. For what?
A. I was making up my mind must I go around there or go around my cousin's house.
Q. Where does your cousin live?
A. Over on 15th Street.
Q. All right. Now going back to the 27th day of December, do you recall where you were that day?
A. No, I cannot.
Q. You have thought about it, though? Have you tried to remember?
A. Yes, I tried to remember.
Q. Did you spend Christmas at home?
A. Yes, I was at home Christmas.
Q. When did you next go to work, or did you?
A. I didn't.

Mr. Treanor: Would the Court indulge me a moment, please?

(Pause.)

By Mr. Treanor:

Q. Are you the same Melvin Carl Jenkins who, on the 19th of July 1962, was convicted of larceny?

A. I don't know what date it was, but I was convicted for it.

[fols. 104-106] Mr. Treanor: I have nothing further.

The Court: Anything further?

Mr. Jones: Nothing further.

The Court: You may step down.

(Witness stepped down)

Mr. Jones: The defense rests, Your Honor.

* * * * * * *

[fol. 107] (At 12:30 p.m. trial stood in recess, to reconvene 1:45 p.m.)

AFTERNOON SESSION

The Deputy Clerk: United States vs. Melvin Jenkins. Mr. Treanor, Mr. Jones.

The Court: You may bring in the jury.

(The jury resumed the jury box.)

CHARGE TO THE JURY

The Court: Ladies and gentlemen of the jury: What we have here is a very simple case that should not detain you long and in which you should have no difficulty in reaching a prompt decision one way or the other.

The defendant, Melvin Jenkins, is on trial on two charges. One charge, contained in the first count of the indictment, charges a robbery of an employee of High's Dairy Products Corporation in one of the High's Ice Cream stores on December 27, 1962. The second count charges an assault with intent to commit robbery on January 24th at a grocery store known as Phil's Market. The second count charges [fol. 108] not robbery but assault with intent to rob because the robbery there was not completed but, according to the Government's contention, the robber fled before completing

the robbery, and so the offense is known as assault with intent to commit robbery.

You will bring in a separate verdict on each of the two counts and in each instance your verdict should be either guilty or not-guilty.

All of you have served in other cases and therefore you are aware of the fact that it is my function and duty to instruct the jury concerning the rules of law that must govern the disposition of the case on trial. You are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

But you ladies and gentlemen of the jury are the sole judges of the facts and you must decide the facts yourselves on the basis, and solely on the basis, of the evidence introduced at this trial.

In addition to instructing the jury as to the law the Court has another function to perform, namely, to summarize the evidence, discuss and comment on the facts and on the evidence to the extent to which I deem it appropriate to do so. That is done, however, merely to aid and assist the jury and my summary of the evidence and my discussion and comments on the facts and on the evidence are not binding [fol. 109] on you, you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding or your view of the evidence differs from mine, then it is your recollection, your understanding and your view of the evidence that must prevail because you are the final judges of the facts. My instructions are binding on you only as concerns the law.

Let me summarize a few general principles of law applicable to all criminal cases, including, of course, this one. Those of you who have participated in trials of other criminal cases have become aware of these rules, but it is my duty to present them afresh to the jury in every case, even at the risk of wearisome repetition.

First—The fact that a defendant has been indicted is not in itself an indication of guilt because an indictment is merely the machinery and the procedure by which a defendant is brought before the Court and is placed on trial.

Second—Every defendant in a criminal case is presumed to be innocent and this presumption of innocence attaches to him throughout the trial until it is overcome by evidence.

Third—The burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. Unless the Government sustains this burden and proves [fol. 110] beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty.

Proof beyond a reasonable doubt, however, does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty and not necessarily proof to an absolute or mathematical certainty.

As its very name implies, by a reasonable doubt is meant a doubt based on reason and not just some whimsical speculation or some capricious conjecture.

I think I can explain the meaning of the words proof beyond a reasonable doubt in simple every day language. It simple means this. If after an impartial comparison and consideration of all the evidence you can say to yourself that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But, on the other hand, if after such an impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defend- [fol. 111] ant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

You are the sole judges of the credibility of witnesses. In other words, it is for you, and for you alone, to determine whether to believe any witness and the extent to which any witness should be credited. In case there is any conflict in the testimony it is your function to resolve the conflict and to determine where the truth lies and what the facts were.

If you find that any witness willfully testified falsely as to any material fact concerning which the witness could not have reasonably been mistaken, then you are at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness or any part of that witness' testimony.

The defendant took the witness stand and testified as a

witness in his own behalf. It appeared on his cross-examination that he has a criminal record. While that fact is not any proof of guilt on the charges on which he is being tried, the law permits the jury to consider the fact that any witness who has a criminal record, if that be the fact, you have a right under the law to consider the defendant's criminal record as a help in determining whether he was a trustworthy witness when he took the witness stand and whether his testimony should be believed. You have a right [fol. 112] under the law, if you see fit to do so, to give less credance, less belief to a witness who has a criminal record than a person whose record is unblemished.

Now the first count, as I said to you before, charges robbery. Robbery is defined as follows in the District of Columbia Code of Laws:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery.

Now the crime of robbery, as I said before, is charged in the first count of the indictment and relates to the hold-up or alleged hold-up of the High's Ice Cream Store on December 27, 1962. Briefly let me summarize the evidence, but let me remind you, before I do so, what I said before at the opening of my remarks, that my summary of the evidence is intended only to help you, you must make your own decision on the basis of the evidence, my discussion is not binding on you. To decide what the facts were and whether the defendant is guilty or not is your function, your duty and your responsibility.

Now as to the first count of the indictment, Ruth McLeish, [fol. 113] one of the employees of the High's Ice Cream Store, testified that at about quarter of seven in the evening of December 27th of last year she was returning to the store after having been gone for her lunch hour. She saw a man standing in front of the store looking up and down the street. She then went into the store. A moment later, she testified, the defendant entered, pointed a gun at the other employee of the store, Ruth Hodges, and Ruth Hodges then pulled money out of the cash register and the robber said to

her, Just the bills, lady, not the change. And Ruth Hodges testified to the same effect and also that she gave him $38. Ruth McLeish identified this defendant as the man whom she saw standing on the street and then enter the store and hold up her co-worker. She testified that she recognized him again in the Commissioner's office on February 7th. Ruth Hodges testified that the defendant was the man who came in and pointed the gun at her.

Now the defense called an investigator, Mr. Francis Savage, who said that he telephoned Ruth Hodges and asked her concerning the matter. He further testified that Ruth Hodges said that she could not identify the man but that her co-worker, Mrs. McLeish, picked his picture out from a number of photographs furnished to her by the police.

Ruth Hodges was called back to the stand and she testified [fol. 114] that she did have a telephone conversation with Francis Savage, but she denied that she said she could not identify the man, but said that she told him that Mrs. McLeish got a better view of him and was better able to identify him.

The defendant took the witness stand and denied that he committed this robbery.

Now so much for the first count of the indictment. The second count of the indictment relates to Phil's Market and the crime charged there is assault with intent to commit robbery.

An assault is defined by law as an unlawful attempt or effort, with force and violence, to do injury to the person of another, coupled with the present apparent possibility of carrying out such an attempt. To point a gun at another person in a menacing or threatening manner or accompanied by any words that would justify the other person assuming that the weapon might be used against him constitutes an assault. If the assault is committed with the intention of committing robbery, then the offense becomes an aggravated form of assault known as assault with intent to kill—assault with intent to rob, rather. That was a slip of the tongue on my part. Assault with intent to rob.

Now in this case, in the case of the second count of the indictment, Sophie Korn, one of the two co-owners of Phil's [fol. 115] Market, testified that she was standing at the counter when the defendant came in and asked for four

pork chops. She directed the clerk to get and and weigh out the four pork chops. The defendant, according to her testimony, then pointed a gun at her and said, I want your money. She testified that she opened the cash register and he said, Put the money in the bag, and she testified that she started to do so. At that moment her husband came in and the defendant turned around and ran. She further testified that a few minutes later the police brought in a man and that she identified this man as the one who held her up and that was the defendant in this case. Her clerk, Joseph Davis, Jr., was called as a witness and he testified that this man came in and ordered some chops, that then he drew the gun and said he wanted money, and that Mrs. Korn was putting money into a paper bag when her husband came in and the man turned around and ran. A few minutes later, according to Joseph Davis, the man was brought back by a detective and again Joseph Davis identified the defendant as being that man.

Officer Demoro of the Police Department testified that he and his partner and a couple of uniformed men responded to an alarm over the radio and they planted themselves at a particular point on East Capitol and 12th Street and they observed the defendant breathing heavily, acting nervously [fol. 116] and running, and arrested him. They took him to the store. At first he refused to get out of the car. They ordered him to do it. They took him into the store and the officer testified that Mrs. Korn and Joseph Davis identified the defendant as the man who had just held up the store.

Mr. Korn testified that he came in while his wife was putting money in the bag and that the man who was in the store ran, but apparently Mr. Korn got only a fleeting glimpse of him and he cannot say for sure as to whether the defendant was the man.

The defendant again took the witness stand and denied that he attempted to rob Mrs. Korn.

It is for you to determine, ladies and gentlemen of the jury, what the fact was and where the truth lies, and in doing so you must use the same practical approach, the same ordinary common sense and the same intelligence that you would employ in determining any other important matter that you have occasion to decide in the course of your every day life.

You will bring in a separate verdict on each of the two counts of the indictment, Count 1, the robbery of the High's Ice Cream Store on December 27th; Count 2, assault with intent to commit robbery at Phil's Market on January 24th, 1963. In each instance your verdict should be either guilty or not guilty, and as you are well aware, your verdict should [fol. 117] be reached by unanimous vote.

* * * * * * *

[fol. 118] The Court: Ladies and gentlemen of the jury, the 12 regular jurors may now retire. Upon reaching the jury room you will first select a foreman from amongst yourselves, who will act as your chairman, preside over your deliberations and speak for you in returning your verdict, and then you will proceed to reach a verdict. Will the 12 regular jurors please follow the Marshal. Will the two alternate jurors please retain their seats for a moment.

(At 2:22 p.m. the jury retired to the jury room to deliberate.)

4:30 p.m.

The Court: You may bring in the jury.

(The jury resumed the jury box.)

The Court: Mr. Foreman, the Court has received your note reading as follows:

> "The jury cannot come to a decision on both counts because of insufficient evidence."

Well, you have all the evidence there is, all the evidence that anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.

Now, I am not going to accept this. You have got to reach a decision in this case.

[fol. 119] You may resume your seat, Mr. Foreman.

Of course, every case involves a problem and you have got to weigh the evidence and reach a conclusion. That is what you are jurors for.

Now, I am going to let you go home at this time. Each of you think it over overnight and I am going to ask you to be back here by 10 o'clock tomorrow morning and resume

your deliberations. Now, from the moment you leave the jury box until you return tomorrow morning at 10 o'clock to resume your deliberations, please don't discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Each of you can individually think about it, but don't discuss it and don't let anybody talk to you about it. Perhaps after you have had a good rest overnight you will be in a position to reach a verdict.

It is a simple case. We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.

I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock tomorrow morning and then resume your deliberations because this case has to be decided. That is all the evidence there is, that is all the evidence anybody can have. If I excuse you we have to try the case again with some other jury and they will [fol. 120] have the same evidence. Now that would not be very sensible, would it. So, you will be excused at this time, ladies and gentlemen of the jury. I know that you will reach a decision tomorrow after you think about it overnight.

(At 4:35 p.m. trial stood in recess, to reconvene May 28, 1963 upon return of jury.)

[fol. 121] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 208-63

[Title omitted]

Transcript of Proceedings—May 28, 1963

Washington, D. C.

The above cause came on for further trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury.

APPEARANCES:

For the Government: John H. Treanor, Jr., Esq., Assistant United States Attorney.

For the Defendant: Thomas R. Jones, Esq.

[fol. 122] COLLOQUY RE TESTIMONY OF MISS RUTH HODGES AND READING THEREOF BY REPORTER

10:00 a.m.

(The following proceedings were had out of the presence of the jury:)

The Deputy Clerk: Are there any preliminary matters?

Mr. Jones: Your Honor, in the case of United States vs. Melvin C. Jenkins, Criminal 208-63, the jury retired yesterday afternoon to deliberate over the verdict and late yesterday afternoon they sent in a note. Your Honor, I have prepared a proposed instruction in response to that note, which I would like to offer to the Court at this time.

The Court: I am not going to give them any instruction. However, I will see what you have prepared. (Pause.)

I am not going to give them any additional instructions at this time. I am going to deny your request.

11:00 a.m.

(The following proceedings were had out of the presence of the jury:)

The Court: Will counsel in the Jenkins case come forward, please.

Gentlemen, the Court has just received a note from the jury reading as follows:

"The jury requests the testimony of Ruth Hodges."

I presume they would want to have the testimony read. [fol. 123] I will bring in the jury for that purpose. I will excuse the Reporter to get his notes and we will suspend the case on trial, the Price case, for a few minutes while this is being done.

. . . . . .

The Court: You may bring in the jury.

(The jury resumed the jury box.)

[fol. 124] The Court: Mr. Foreman, the Court has received your note reading as follows:

"The jury requests the testimony of Ruth Hodges."

Accordingly, the Court has arranged to have the Reporter get his notes and I shall ask the Reporter to read the testimony of Ruth Hodges when she was called in behalf of the Government. She was recalled again by the defense. Do you want her testimony on both occasions or only on the occasion when she was called by the Government?

The Foreman: Well, I think when she was called by the Government would be sufficient.

The Court: If you wish, we can read her testimony on both occasions.

The Foreman: That would help a lot, sir.

The Court: First, I shall ask the Reporter to read the testimony that she gave when she was called by the Government.

(The record was read by the Reporter.)

The Court: Would you also like to have Ruth Hodges' testimony when she was recalled by the defense?

The Foreman: Yes, I would, Your Honor.

The Court: Very well, you may read that.

(The record was read by the Reporter.)

[fol. 125] The Court: Unless any one of you has any other questions—has any one of you any further questions that the Court can help you with? If not, you may retire again and resume your deliberations.

* * * * * * *

The Court: Ladies and gentlemen of the jury, you may retire again and resume your deliberations. The Court hopes that you will reach a verdict presently.

[fols. 126-127] VERDICT OF JURY

2:20 p.m.

The Court: You may bring in the jury.

(The jury resumed the jury box.)

The Deputy Clerk: Will the Foreman please rise.
Mr. Foreman, has the jury agreed upon a verdict?
The Foreman: Yes, we have.
The Deputy Clerk: What say you as to the defendant, Melvin C. Jenkins, on Count 1 of the indictment?
The Foreman: Guilty.
The Deputy Clerk: What say you as to the defendant, Melvin C. Jenkins, on Count 2 of the indictment?
The Foreman: Not guilty.

* * * * * * *

[fols. 128-132] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 133] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,032

MELVIN C. JENKINS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

OPINION—Decided February 13, 1964

Mr. Robert R. Tiernan, with whom *Mr. Jerome H. Heckman* (both appointed by this court) was on the brief, for appellant.

Mr. David Epstein, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, *Frank Q. Nebeker* and *John H. Treanor,* Assistant United States Attorneys, were on the brief, for appellee. *Mr. B. Michael Rauh,* Assistant United States Attorney, also entered an appearance for appellee.

Before WILBUR K. MILLER, BURGER and WRIGHT, *Circuit Judges.*

PER CURIAM: Evidence for the Government showed that Jenkins entered a store and, at gun point, forced an em- [fol. 134] ployee to give him the contents of the cash drawer. Testifying in his own behalf, Jenkins denied the robbery, said he could not remember where he was on the day in question, but admitted having been in the store on several occasions. Cross-examination disclosed a criminal record which, of course, went to his credibility. Found guilty by the jury, he appeals.

The principal claims of error advanced by Jenkins are that the trial judge gave a coercive instruction and improperly commented on the evidence. Significantly, the appellant did not object at the time and protests for the

first time on appeal. Regardless of that, we have considered the matter and have concluded that, viewed in the context of the whole charge, the challenged statements of the trial judge do not require reversal.[1]

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[1] The court's statements to the jury did not in any sense purport to be the charge under *Allen* v. *United States*, 164 U. S. 492 (1896), to which our dissenting colleague applies colorful words such as "dynamite" and "nitroglycerin." They were no more than the judge's response to a jury which reported it was "deadlocked" after only very brief deliberations. We see no basis whatever for characterizing these statements as coercive, especially as the jury did not reconvene and resume its deliberations until the following day.

Affirmed.

WRIGHT, *Circuit Judge, dissenting*: Jenkins was convicted[1] of the robbery of $38.00 from a High's Dairy Products store and sentenced to serve three to ten years. [fol. 135] I believe this conviction should be reversed because of two trial court errors: (1) coercive instruction to the jury, and (2) improper comment on the evidence during the charge.

I

The court began its charge to the jury in this case with the following words: "Ladies and gentlemen of the jury: What we have here is a very simple case that should not detain you long and in which you should have no difficulty in reaching a prompt decision one way or the other." Nevertheless, after two hours of deliberation, the jury sent the court a note reading: "The jury cannot come to a decision on both counts because of insufficient evidence." Thereupon the court gave the jury additional instructions,

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[1] The indictment was in two counts: (1) robbery, 22 D.C. Code § 2901 (1961), and (2) assault with intent to commit robbery, 22 D.C.Code § 501 (1961). The defendant was convicted on Count 1.

including: "Now, I am not going to accept this. You have got to reach a decision in this case." [2]

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[2] The complete additional instruction reads:

"The Court: Mr. Foreman, the Court has received your note reading as follows:

" 'The jury cannot come to a decision on both counts because of insufficient evidence.'

"Well, you have all the evidence there is, all the evidence that anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.

"Now, I am not going to accept this. You have got to reach a decision in this case.

"You may resume your seat, Mr. Foreman.

"Of course, every case involves a problem and you have got to weigh the evidence and reach a conclusion. That is what you are jurors for.

"Now, I am going to let you go home at this time. Each of you think it over overnight and I am going to ask you to be back here by 10 o'clock tomorrow morning and resume your deliberations. Now, from the moment you leave the jury box until you return tomorrow morning at 10 o'clock to resume your deliberations, please don't discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Each of you can individually think about it, but don't discuss it and don't let anybody talk to you about it. Perhaps after you have had a good rest overnight you will be in a position to reach a verdict.

"It is a simple case. We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.

"I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock tomorrow morning and then resume your deliberations because this case has to be decided. That is all the evidence there is, that is all the evidence anybody can have.

[fol. 136] After further deliberation, the jury brought in a verdict of guilty on Count 1 and not guilty on Count 2. It is my view that the jury may well have concluded that the judge's additional instruction meant what it said: "You have got to reach a decision in this case"—that they were required to bring in a verdict. I also believe that, under the circumstances, the verdict as returned was, in all probability, a compromise.

The charge to the jury given here is more coercive than anything I have heard or read in 25 years of exposure to criminal jury trials. Even the 67-year-old *Allen*[3] charge, now condemned as "the dynamite charge,"[4] does not go [fol. 137] so far in coercing the jury. At least in the *Allen* charge, after the jury is told that it is its duty to reach a verdict, the words "if [you] can conscientiously do so" are added. Here the jury was simply told flat out: "You have got to reach a decision in this case."

There is no requirement in law that a jury agree. As a matter of fact, a hung jury can be a safeguard to liberty. The urge to convict in times of public hysteria may be very

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If I excuse you we have to try the case again with some other jury and they will have the same evidence. Now that would not be very sensible, would it. So, you will be excused at this time, ladies and gentlemen of the jury. I know that you will reach a decision tomorrow after you think about it overnight."

[3] See *Allen* v. *United States*, 164 U.S. 492 (1896).

[4] "The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. There is small, if any, justification for its use." *Green* v. *United States*, 5 Cir., 309 F.2d 852, 854 (1962). The "dynamite charge" is also called the "nitroglycerin charge," *Huffman* v. *United States*, 5 Cir., 297 F.2d 754, 759 (1962), the "third degree instruction," *Leech* v. *People*, 112 Colo. 120, 146 P.2d 346, 347 (1944), and the "shotgun instruction," *State* v. *Nelson*, 63 N.M. 428, 321 P.2d 202, 204 (1958). This court recently noted that "[t]he 'dynamite charge' is intended to 'encourage' jurors to agree." *Campbell* v. *United States*, —— U.S.App.D.C. ——, ——, 316 F.2d 681, 681 n.1 (1963), and see also cases there cited, especially *Green* v. *United States*, *supra*, and the authorities cited 309 F.2d at 854-855 n.3.

great. And the common law recognizes that, even where there is a failure of proof, often only the uncommon man can stand against this pressure. Thus, by having a jury of twelve, with a unanimous individual vote required, a measure of protection is afforded.

The majority's approval of this coercive charge is also in conflict with two decisions of the Fifth Circuit Court of Appeals. In *Powell* v. *United States,* 5 Cir., 297 F.2d 318, 320 (1961), the instruction, "If you follow the principles of law given you by the Court and if you recall the evidence in this case you ought to be able to agree on a verdict," was held sufficiently coercive to require reversal of the conviction. And in *Green* v. *United States, supra* Note 4, 309 F.2d at 855, the court held that the instruction, "* * * it is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment [fol. 138] because the rule is that the majority will have better judgment than the mere minority * * *," far exceeded permissible limits. The instruction "prejudiced the right of an accused to a hung jury and a mistrial by tending to stifle the dissenting voices of minority jurors." *Id.* at 856.

A comparison of the objectionable portion of the charge given here with the charges in the *Powell* and *Green* cases demonstrates that the charge in this case was by far the most coercive. Yet in both those cases the Fifth Circuit held that the giving of such a charge was error requiring reversal of the convictions.

II

The second trial court error concerns the inaccurate and incomplete summary of a key prosecution witness' testimony in the charge. On cross-examination the witness, Mrs. Hodges, testified as follows:

[By defense counsel.]

"Q. Do you recall having a conversation with a Mr. Savage of the Legal Aid Agency on April 9th, 1963?

"A. No.

"Q. Do you recall an investigator of the Legal Aid Agency talking to you and asking you if you knew anything about this case?

"A. No.

"The Court: What is your answer?
"The Witness: No."

And also:

[By defense counsel.]

"Q. Isn't it true, Mrs. Hodges, that you were actually unable to identify this defendant on a prior occasion?

"The Court: You will have to specify the prior occasion. You can't ask enigmas like that.

"Q. Was there a prior occasion when you were unable to identify this defendant?

[fol. 139] "The Court: No, no; you will have to make clear what you are referring to. You cannot mystify a witness, Mr. Jones.

"Mr. Jones: Very well, Your Honor, I have no further questions at this time."

A Legal Aid investigator, Mr. Savage, was called and testified that he had indeed interviewed Mrs. Hodges, by phone, and that she told him "she was not able to identify the man." On being recalled, Mrs. Hodges admitted that she had spoken to the investigator as he had testified. Therafter she was asked:

[By defense counsel]

"Q. But the question is, did you tell him that you couldn't identify him [the defendant]?

"A. Yes."

Apparently not satisfied with the answer, the court interrupted at this point to take over the questioning of the witness:

"The Court: Did you tell Mr. Savage that you could not identify this defendant as being the man who held up the store? Did you tell him that? Do you understand that?

"The Witness: I told him that I could his face part, but that Mrs. McLeish got a better description of him.

"The Court: We are asking you whether you told Mr. Savage that you could not identify this defendant. Did you tell him that?

"The Witness: Well, no, I didn't tell him."

In summing up this portion of the evidence, the trial court did not mention the answer Mrs. Hodges had given to defense counsel, but only the answer elicited by the court itself.

> "Now the defense called an investigator, Mr. Francis Savage, who said that he telephoned Ruth Hodges and asked her concerning the matter. He further testified that Ruth Hodges said that she could not identify the [fol. 140] man but that her co-worker, Mrs. McLeish, picked his picture out from a number of photographs furnished to her by the police.
>
> "Ruth Hodges was called back to the stand and she testified that she did have a telephone conversation with Francis Savage, but she denied that she said she could not identify the man, but said that she told him that Mrs. McLeish got a better view of him and was better able to identify him."

A judge's discretion to comment on the facts "is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. * * * This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; * * *." *Quercia* v. *United States*, 289 U.S. 466, 470 (1933). See also *Wabisky* v. *D. C. Transit System, Inc.*, —— U.S.App.D.C. ——, —— F.2d —— (No. 17,720, decided December 12, 1963).

The court's instruction here was not only misleading, it was also one-sided. In a simple criminal case, there is little excuse for the trial court's exercising its common law right to comment on the testimony of witnesses. The jury is in as good a position as the judge, not only to remember their testimony, but to appraise it. So, when a trial judge undertakes the risk of trenching of the function of the jury, he must do so with the certain knowledge that his actions will be subjected to strict scrutiny. Here the summation by the court of the testimony on the identifying witness, Mrs. Hodges, is indefensible, not only from the standpoint of accuracy but from the standpoint of fairness as well.

I respectfully dissent.

[fol. 141] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,032

Crimial 208-63

MELVIN C. JENKINS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, BURGER AND WRIGHT, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Separate dissenting opinion by Circuit Judge Wright.

[fols. 142-153] Petition for rehearing en banc covering 12 pages filed February 28, 1964 omitted from this print. It was denied, and nothing more by order. April 3, 1964.

[fols. 154-156] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal 208-63

[Title omitted]

Before: BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, AND MCGOWAN, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING EN BANC—
April 3, 1964

On consideration of appellant's petition for rehearing *en banc*, it is

Ordered by the Court *en banc* that appellant's aforesaid petition is hereby denied.

Per Curiam.

Chief Judge BAZELON, and Circuit Judges FAHY, WASHINGTON and WRIGHT would grant appellant's petition for rehearing *en banc*.

[fol. 157] Clerk's Certificate to Foregoing transcript omitted in printing.

[fol. 158] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1963

No.

MELVIN C. JENKINS, Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 6, 1964

Upon consideration of the application of counsel for petitioner

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 2nd, 1964.

Earl Warren, Chief Justice of the United States

Dated this 6th day of May, 1964.

[fol. 160] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1964

Case No.

MELVIN C. JENKINS,

v.

U.S.

To: The Chief Justice.

Application for further extension of time to file cert. You have heretofore given him a 29 day extension until today and he asks for one more day or until June 3rd.

Extension Requested: One day—June 3rd.

Reason: Other Commitments.

OK

E.W.

[fol. 160] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. 107 Misc.

MELVIN C. JENKINS, Petitioner,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —December 14, 1964

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 761 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 760090 815